No. 92-756

(2)

Supreme Court, U.S.
FILED
NOV 24 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1992

In Re: VICON RECOVERY SYSTEMS, INC. a/k/a VICON RECOVERY SYSTEMS, INC. OF VERMONT, VICON RECOVERY SYSTEMS OF MANCHESTER, INC., VICON RECOVERY SYSTEMS OF MASSACHUSETTS, INC., VICON RECOVERY SYSTEMS OF VERMONT, INC. and VICON RECOVERY SYSTEMS OF WEBSTER, INC.,

Debtors.

CITY OF RUTLAND AND TOWN OF BRISTOL, VERMONT,

Petitioners,

vs.

THE INDUSTRIAL BANK OF JAPAN, LTD., NEW YORK BRANCH and THE INDUSTRIAL BANK OF JAPAN TRUST COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS

HOWARD S. BELTZER
Counsel of Record

WHITE & CASE
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

FRANK J. VECCHIONE
CRUMMY, DEL DEO, DOLAN
GRIFFINGER & VECCHIONE
One Riverfront Plaza
Newark, New Jersey 07102
(201) 596-4500

Attorneys for Respondents

BEST AVAILABLE COPY

16 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was the court of appeals correct in holding that the perfected pre-petition tax liens of petitioners, the City of Rutland, Vermont and the Town of Bristol, Vermont (collectively, the "Towns") were subordinate to administrative claims held, *inter alia*, by respondents, The Industrial Bank of Japan, Limited, New York Branch and The Industrial Bank of Japan Trust Company (collectively, "IBJ") pursuant to Section 724(b) of the Bankruptcy Code?

2. Was the court of appeals correct in refusing to surcharge IBJ's collateral with the unperfected pre-petition tax claims and administrative claims of the Towns pursuant to Section 506(c) of the Bankruptcy Code?

STATEMENT OF THE PARTIES TO THIS PROCEEDING

(1) The Industrial Bank of Japan, Limited, New York Branch: branch of The Industrial Bank of Japan, Limited, a publicly-held Japanese banking corporation

- less than wholly owned subsidiaries of The Industrial Bank of Japan, Limited:

  a) The Industrial Bank of Japan Trust Company

  b) IBJ Schroder Bank & Trust Company (which, in turn, owns Aubrey G. Lanston & Co. Inc. and Execution Services Incorporated)

  c) The Industrial Bank of Japan (Germany)

  d) "IBJ-CA Consult" Handels-und Investitionsberatungsgesellschaft m.b.H.

  e) CCIC Finance Limited

  f) P.T. IBJ Indonesia Bank

  g) P.T. Bumi Daya - IBJ Leasing

  h) Krung Thai IBJ Leasing Co., Ltd.

(2) The Industrial Bank of Japan Trust Company

- parent: The Industrial Bank of Japan, Limited, a publicly-held Japanese banking corporation

- less than wholly owned subsidiary: IBJ TC and Leasing (U.S.A.), Inc.

TABLE OF CONTENTS

PAGE

Counterstatement of Questions Presented i

Statement of the Parties to This Proceeding ii

Table of Contents iii

Table of Authorities iv

Statement 1

Reasons for Denying the Writ 4

A. Section 724(b), the Controlling Statute, is Clear on its Face, and is the Subject of No Conflicting Decisions among the Circuits 4

B. Section 506(c) Cannot be Used to Avoid the Effect of Section 724(b) 8

Conclusion 9

TABLE OF AUTHORITIES

Cases PAGE

Equibank, N.A. v. *Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80 (3d Cir. 1989) 6

In re Brilz, 96 B.R. 308 (Bankr. D. Mont. 1989) 5

In re Frank Meador Buick, Inc., 59 B.R. 787 (Bankr. W.D. Va.), *aff'd*, 65 B.R. 200 (W.D. Va. 1986) . . 5

In re Granite Lumber Co., 63 B.R. 466 (Bankr. D. Mont. 1986) 5

In re J.P. Const. Co., 54 B.R. 895 (Bankr. W.D. Va. 1985) 5

In re R.L. Inge Development Corp., 78 B.R. 793 (Bankr. E.D. Va. 1987) 5

In re Sherrill, 78 B.R. 804 (Bankr. W.D. Tex. 1987) . 8

Lincoln Savings Bank v. *Suffolk County Treasurer (In re Parr Meadows Racing Ass'n, Inc.)*, 880 F.2d 1540 (2d Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990) 6

Maryland Nat'l Bank v. *Mayor and City Council of Baltimore*, 723 F.2d 1138 (4th Cir. 1983) 6

Cases PAGE

Pearlstein v. *U.S. Small Business Admin.*, 719 F.2d 1169 (D.C. Cir. 1983) 5

Perpetual American Bank v. *District of Columbia (In re Carlisle Court, Inc.)*, 36 B.R. 209 (Bankr. D.D.C. 1983) 5

Taxel v.*California State Board of Equalization (In re Sluggo's Chicago Style, Inc.)* 94 B.R. 625 (9th Cir. B.A.P. 1988), *aff'd*, 912 F.2d 1073 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 784 (1991) 5

Toibb v. *Radloff*, 111 S. Ct. 2197 (1991) 7

Union Bank v. *Wolas*, 112 S. Ct. 527 (1991) 7

United States v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989) 7

Wurst v. *City of New York (In re Packard Properties, Ltd.)*, 112 B.R. 154 (Bankr. N.D. Tex. 1990) 5

STATUTES

PAGE

11 U.S.C. § 103(b) 6

11 U.S.C. § 107(c)(3)(repealed) 6

11 U.S.C. § 363 2

11 U.S.C. § 364 2

11 U.S.C. § 503(b) 2

11 U.S.C. § 506(c) . . . . . i, 2, 3, 8

11 U.S.C. § 507(a) 2, 4

11 U.S.C. § 724(b) . . . . . *passim*

No. 92-756

IN THE

Supreme Court of the United States

October Term, 1992

In Re: VICON RECOVERY SYSTEMS, INC. a/k/a VICON RECOVERY SYSTEMS, INC. OF VERMONT, VICON RECOVERY SYSTEMS OF MANCHESTER, INC., VICON RECOVERY SYSTEMS OF MASSACHUSETTS, INC., VICON RECOVERY SYSTEMS OF VERMONT, INC. and VICON RECOVERY SYSTEMS OF WEBSTER, INC.,
Debtors.

CITY OF RUTLAND AND TOWN OF BRISTOL, VERMONT,
Petitioners,

vs.

THE INDUSTRIAL BANK OF JAPAN, LTD., NEW YORK BRANCH and THE INDUSTRIAL BANK OF JAPAN TRUST COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS

STATEMENT

Vicon Recovery Systems, Inc. ("Vicon"), the primary debtor in the Chapter 7 proceedings, constructed a waste-to-energy facility in the State of Vermont. IBJ financed the construction

of the facility, and in connection therewith extended secured financing in an amount exceeding $37,000,000.

Vicon filed a Chapter 7 petition on August 23, 1988. After this filing, IBJ extended additional funding to Vicon at the request of Vicon's trustee in order to finance limited continuing operations and to pay the costs of administering the estate. Such post-petition financing pursuant to 11 U.S.C. § 364 and consensual use of IBJ's cash collateral pursuant to 11 U.S.C. § 363 was approved by successive orders of the United States Bankruptcy Court for the District of New Jersey. Such orders granted to IBJ liens and "superpriority" administrative claims in connection with such advances.[1]

The Towns were creditors of Vicon, asserting pre-petition liens and unsecured claims for unpaid municipal taxes. The Towns also asserted that their tax *liens* took priority over IBJ's *lien* (mortgage) for construction financing under Vermont law. The Towns also, in effect, contended that all liens on the plant -- which constituted most of the property of the estate -- took priority over administrative and other priority unsecured claims, except for their attempted surcharge of their claims against IBJ's collateral pursuant to 11 U.S.C. § 506(c) (see page 8, *infra*). The Towns did not, however, object to IBJ's financing of the bankruptcy case or to the administrative claims it was awarded therefor. Indeed, the Towns asserted that their post-petition unsecured claims were also entitled to administrative priority.

---

[1] An "administrative" claim is a claim for the necessary expenses of maintaining and preserving the estate. It has a first priority among unsecured priority claims pursuant to 11 U.S.C. §§ 507(a)(1) and 503(b). A "superpriority" administrative claim has priority over other administrative claims. For purposes hereof, IBJ and the Towns had administrative claims in addition to their lien claims against Vicon.

When Vicon's trustee sought to sell the facility and associated assets in mid-1990, the issue of the distribution of proceeds was first joined. IBJ relied, *inter alia*, on Section 724(b) of the Bankruptcy Code, which unambiguously provides that administrative expense claims in Chapter 7 proceedings can step into the shoes of tax liens and be paid in their place and stead. This provision thereby gives expenses of administration a better chance of being paid in an estate burdened with secured debt. The bankruptcy court, in its decision on April 5, 1991, inexplicably ignored this controlling statute and the considerable and unanimous authority thereunder. It subordinated all administrative claims to lien claims and then held that the Towns' perfected pre-petition liens were entitled to priority over IBJ's liens under Vermont law. The bankruptcy court further held that the Towns' other claims were subordinate to IBJ's liens.

The district court, based on the pleadings submitted and without argument, reversed the bankruptcy court insofar as it had ignored 11 U.S.C. § 724(b), and affirmed the bankruptcy court's refusal to surcharge IBJ for the Towns' unsecured claims under 11 U.S.C. § 506(c). On remand, the bankruptcy court then awarded $181,660.49 to the Towns as their ratable distribution on account of their administrative claims, and $312,992.94 to IBJ as a ratable distribution on account of its administrative claims. The sum of these amounts equalled the Towns' perfected pre-petition tax liens. The bankruptcy court then directed the distribution of the remainder of the sale proceeds of the facility to IBJ on account of its mortgage lien. The court of appeals affirmed the district court's decision, again on the pleadings and without argument, "essentially for the reasons set forth in the district court opinion" (Towns' Petition for a Writ of Certiorari (the "Petition"), Appendix F, at 29a).

REASONS FOR DENYING THE WRIT

A. Section 724(b), the Controlling Statute, is Clear on its Face, and is the Subject of No Conflicting Decisions among the Circuits

Section 724(b) of the Bankruptcy Code is a mathematically-precise provision which reflects a legislative decision to subordinate tax liens in Chapter 7 liquidation proceedings. The sub-section relevant to the facts at bar, Section 724(b)(2), plainly subordinates tax liens to administrative claims and to holders of unsecured claims with priorities above those of pre-petition tax claims under 11 U.S.C. § 507(a).[2] The district court properly cited the relevant legislative history: "[Section 724(b)] subordinates tax liens to administrative expense and wage claims. . . In other words, the priority claimants step into the shoes of the tax collector." Petition, Appendix C, at 14a. *See also* the Collier's commentary cited by the district court ("The effect of section 724(b) is to treat a tax lien as a claim ahead of the priority for taxes (now section 507(a)(7)) and after the other priorities under section 507(a) rather than as a secured claim"). *Id.*

The district court and the court of appeals conscientiously applied this statute to the facts by holding that the property securing the Towns' pre-petition tax claims would be ratably distributed between the two unsatisfied administrative claims in the proceedings, *i.e.*, the post-petition tax claims of the Towns and the court-sanctioned claims of IBJ arising from the funding of the Vicon estate. This calculus is mandated by Section 724(b)(2).

---

[2] Tax claims are seventh priority claims under 11 U.S.C. § 507(a).

Section 724(b) has been applied as written in every case in which it has been raised. As the district court noted: "[T]his court has not located any case in which a court determined that a taxing authority is entitled to payment prior to administrative expenses under § 724(b)" (Petition, Appendix C, at 17a, n.3). *See, e.g., Pearlstein* v. *U.S. Small Business Admin.*, 719 F.2d 1169, 1175 (D.C. Cir. 1983); *Taxel* v. *California State Board of Equalization (In re Sluggo's Chicago Style, Inc.)*, 94 B.R. 625, 630 (9th Cir. B.A.P. 1988), *aff'd*, 912 F.2d 1073 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 784 (1991) (Section 724(b) "divests or subordinates the security interest of a taxing agency to a sixth level priority unsecured claim"); *Wurst* v. *City of New York* (*In re Packard Properties, Ltd.*), 112 B.R. 154, 156 (Bankr. N.D. Tex. 1990) ("[W]henever property of the estate is burdened by a tax lien (local, state or federal) the amount of that lien can be used to pay administrative expenses"); *In re Brilz*, 96 B.R. 308, 310 (Bankr. D. Mont. 1989); *In re R.L. Inge Development Corp.*, 78 B.R. 793, 794 (Bankr. E.D. Va. 1987); *In re Frank Meador Buick, Inc.*, 59 B.R. 787, 790 (Bankr. W.D. Va.), *aff'd*, 65 B.R. 200 (W.D. Va. 1986); *In re Granite Lumber Co.*, 63 B.R. 466, 470-471 (Bankr. D. Mont. 1986); *In re J.P. Const. Co.*, 54 B.R. 895, 897 (Bankr. W.D. Va. 1985); *Perpetual American Bank* v. *District of Columbia* (*In re Carlisle Court, Inc.*), 36 B.R. 209 (Bankr. D.D.C. 1983). To repeat, as noted by the district court, *there is no contrary authority* wherein a court refused to subordinate tax liens to administrative expenses under 11 U.S.C. § 724(b)(2).

Faced with the clearest of statutory obstacles and unanimous authority contrary to their position, the Towns respond with (i) a manufactured "conflict" among the Circuits, (ii) an argument that Section 724(b) is inapplicable here because the Vicon estate had no "interest" in the subject facility, and (iii) an ill-defined contention that IBJ is somehow not entitled to share in the benefits of Section 724(b)(2) because of its status as mortgagee in the bankruptcy proceedings and on general

equitable grounds. IBJ shall respond briefly to each argument in turn.

First, as noted above, the courts have been unanimous is applying the precise provisions of Section 724(b) as written; there is not a single contrary decision. The three cases cited by the Towns are all readily distinguishable. *Equibank, N.A.* v. *Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80 (3d Cir. 1989), was a Chapter 11 proceeding to which Section 724(b) was simply inapplicable. *See* 11 U.S.C. § 103(b) ("Subchapters I and II of chapter 7 apply only in a case under such chapter").[3] *Maryland Nat'l Bank* v. *Mayor and City Council of Baltimore*, 723 F.2d 1138 (4th Cir. 1983), was a case commenced under Chapter XI of the former Bankruptcy Act and thereafter converted to Chapter VII of such Act. The statutory predecessor of Section 724(b), Section 67(c)(3) of the former Bankruptcy Act, 11 U.S.C. § 107(c)(3)(repealed), applied only to tax liens on personal property unaccompanied by possession, and thus was inapplicable to the real property taxes there (and here) at issue. *Lincoln Savings Bank* v. *Suffolk County Treasurer* (*In re Parr Meadows Racing Ass'n, Inc.*), 880 F.2d 1540 (2d Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990), made absolutely no mention of Section 724(b) and, as noted by the district court, "there is no indication that administrative expenses were involved." Petition, Appendix C, at 17a, n.3. There is simply no conflict among the Circuits, or (except for the bankruptcy court decision below) any contrary authority in the lower courts, regarding the issues at bar.

Second, the Towns' suggestion that Section 724(b) is inapplicable on its face because the Vicon estate had no "interest" in the subject property is unpersuasive in the context of Chapter 7 liquidations. When property is finally sold in

---

[3] *Equibank* was also a Third Circuit case which that court did not find in conflict with its decision below.

Chapter 7 proceedings there often proves to have been no equity in the estate. To limit the applicability of Section 724(b) to estates which were not fully encumbered would thus render the provision virtually meaningless. *See* district court opinion (Petition, Appendix C, at 15a, n.2), and the authority cited therein. In any event, the Towns could have objected to IBJ's financing or moved to dismiss the proceedings, and they did not.

Finally, the Towns' attempt to graft equitable or other unstated exceptions onto the plain language of Section 724(b) must also fail. Consistent with its general approach to statutory interpretation, this Court has been vigilant in recent years in according the Bankruptcy Code its plain meaning as drafted. *See, e.g., Union Bank* v. *Wolas*, 112 S. Ct. 527 (1991); *Toibb* v. *Radloff*, 111 S. Ct. 2197 (1991); *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989). It is difficult to imagine a more mathematically-precise provision than Section 724(b), and it too must be applied as drafted.

IBJ's status as mortgagee is entirely irrelevant to its entitlement to share in the subordinated tax lien, ratably with the Towns, as an administrative claimant pursuant to Section 724(b). There is nothing on the face of the statute which indicates such a restriction. In fact the legislative history suggests that no restrictions on the types of claimants entitled to the benefits of the subordination would be appropriate. *See* legislative history cited in the district court opinion and quoted above at page 4 (Section 724(b) "subordinates tax liens to administrative expense and wage claims. . . In other words, the priority claimants step into the shoes of the tax collector").

Similarly, the Towns' "equitable" arguments are unsupported by the record of these proceedings and cannot detract from the face of Section 724(b). Thus, IBJ never "advocated" the filing of the bankruptcy proceedings as a guise

to avoid the payment of tax claims (Petition at 8), and, to IBJ's knowledge, the property was never operated "contrary to the provisions of the United States Bankruptcy Code" (Petition at 16). These and many similar assertions constitute no more than desperate attempts to circumvent the clear application of a precise statute to the facts at bar. Such attempts were properly rejected by the district court and by the court of appeals without the need for argument, and should similarly be rejected by this Court. Bankruptcy alters the rights and recoveries of many creditors, including municipalities. If the Towns are concerned with the effect of one technical provision of Chapter 7 of the Bankruptcy Code on municipal finances, their grievances must be directed to Congress and not to this Court.

B. Section 506(c) Cannot be Used to Avoid the Effect of Section 724(b)

As a final attempt to craft an "issue" worthy of this Court's review, the Towns contend that the lower courts' refusal to surcharge tax claims against IBJ's collateral under 11 U.S.C. § 506(c) constituted fundamental error. Indeed, the Towns state that "The lower courts need guidance from this Court as to the proper application of this federal statute" (Petition at 16). While there conceivably may be instances, albeit difficult to imagine in the abstract, where this fact-based provision of the Bankruptcy Code may require the input of this Court, this case is undoubtably not among them. As the district court noted, the one case on point held that "Section 506(c) will not be available as a substitute to 'back and fill'" in a case where Section 724(b) provides an avenue for the payment of administrative expenses. *In re Sherrill*, 78 B.R. 804, 807 (Bankr. W.D. Tex. 1987), quoted in district court opinion (Petition, Appendix C, at 18a). The Towns' conclusory attempt to raise this issue for this Court's review should be rejected.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

HOWARD S. BELTZER
Counsel of Record
WHITE & CASE
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

FRANK J. VECCHIONE
CRUMMY, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
One Riverfront Plaza
Newark, New Jersey 07102
(201) 596-4500

Attorneys for Respondents